In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-877

RICHARD R. HORTON, ET AL.,
Appellants,

VERSUS

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; E. RAY LONG, City Clerk of the City of Oklahoma City, Oklahoma; ARNE LOVEN, City Treasurer of the City of Oklahoma City; and M. A. SWATEK AND COMPANY, an Oklahoma Corporation,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF OKLAHOMA

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

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January, 1978

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Pursuant to the Revised Rules of the Supreme Court 14(2), 16-1(d) and 16-1(b), appellees move that this appeal be dismissed, or, alternatively, that the judgment of the Supreme Court of the State of Oklahoma be affirmed on the following grounds:

1. Under the Revised Rules of the Supreme Court 14(2) the appellees move the Court to dismiss the appeal

herein on the ground that said appeal was not timely prosecuted.

2. Under the Revised Rules of the Supreme Court 16-1(d) the appellees move the Court to dismiss the appeal herein on the ground that the question posed has been so foreclosed by decisions of the Supreme Court as to make further argument unnecessary.

3. Under the Revised Rules of the Supreme Court 16-1(b) the appellees move the Court to dismiss the appeal herein on the ground that the federal question posed is lacking in the necessary substantiality as a result of previous decisions by the Supreme Court having foreclosed said question.

STATEMENT OF THE CASE

On April 30, 1974, a petition was received by The City of Oklahoma City requesting the formation of a sewer district. Upon a finding that owners of more than fifty per cent of the area to be affected had joined in the petition, the City Council determined the petition to be sufficient according to law. Pursuant to OKLA. STAT. tit. 11 § 270.6 (Supp. 1977), the City Council by Ordinance 14,117 created Sewer District 1183. On the same date, the City Council adopted preliminary and final plans for the construction of said sewer district. The project was then advertised, built and accepted, all in accordance with state statutes and municipal ordinances. On March 21, 1976, the City Council approved an ordinance assessing the cost of construction for Sewer District 1183 against the property benefitted.

The appellants on April 1, 1976 filed a petition seeking injunctive relief from the sewer district assessments. The relief was granted by the District Court. The Supreme Court of Oklahoma reversed the decision of the trial court on May 10, 1977, holding, in part:

> "Because neither the applicable statutes nor the Due Process Clause of the United States Constitution, requires that landowners be given notice of a governmental body's approval of preliminary plans, estimates, and plats, in the creation of a sewer district, *when the district is initiated by a landowner's petition*, we reverse the Order of the trial court which held that notice was required and set aside the injunction issued by that court." (Emphasis added and see A-12 of Appellants' Jurisdictional Statement)

A petition for rehearing was denied by the Supreme Court of Oklahoma on July 22, 1977.

QUESTION I

Does appellants' failure to docket their appeal within the time prescribed by Rule 13(1) of the Revised Rules of the Supreme Court justify the dismissal of that appeal for want of prosecution?

Appellees move this Court to dismiss this appeal on the ground that said appeal was not timely docketed.

Rule 14(2) of the Revised Rules of the Supreme Court states:

> "2. If a notice of appeal has been filed but the case has not been docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just."

Appellants failed to docket this appeal within the time prescribed by Rule 13(1) of the Revised Rules of the Supreme Court which states:

> "1. Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, except that in the case of appeals pursuant to Section 1252, 1253, or 2282 of Title 28 of the United States Code the time limit for docketing shall be sixty days from the filing of the notice of appeal. For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored."

According to Appellants' Jurisdictional Statement at page 2, the judgments appealed from were the Order of the Supreme Court of Oklahoma of May 10, 1977 (See Appendix A-1 of Appellants' Jurisdictional Statement), and the Order of the Supreme Court of the State of Oklahoma denying rehearing, which was filed July 22, 1977 (See Appendix E-1 of Appellants' Jurisdictional Statement). Appellants thereafter gave timely notice of appeal October 11, 1977 (See Appendix B-1 of Appellants' Jurisdictional Statement).

This appeal was docketed on the 19th day of December 1977, approximately 150 days after the entry of judgment appealed from. No extension of time was asked or granted prior to the expiration of the time period prescribed by the Revised Rules of the Supreme Court; nor did any explanation accompany the untimely docketing. Therefore appellees move the Supreme Court to dismiss this appeal on the ground that it was not timely docketed in accordance with Rule 13.(1) of the Revised Rules of the Supreme Court which rule provides that the time limit for docketing the appeal shall be ninety days from the entry of the judgment appealed. See *Pittsburg Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U.S. 32, *reh. den.* 385 U.S. 995 (1966), and see *Bernard Shapiro* v. *Doe*, 396 U.S. 488, *reh. den.* 397 U.S. 970 (1970).

QUESTION II

If it has been previously decided by the Supreme Court that due process does not require the giving of notice to landowners of the formation of an assessment district, may this question form the basis of an appeal?

The appellants state:

"3. The City of Oklahoma City further on May 6, 1975, adopted a Resolution which acknowledged receipt of *preliminary plans, preliminary assessment plat*, the City Engineer's *preliminary estimate* of cost, and directed the City Engineer to prepare final plans and estimates for Sewer District 1183." (Emphasis added and see Appellants' Jurisdictional Statement, page 8)

The appellants further state that it was stipulated by the appellees that the above-mentioned Resolution "was never published . . . or that notice was ever mailed to any record property owner of the property to be assessed. . . ." (See Appellants' Jurisdictional Statement, page 9)

The appellants further attack the procedural steps taken by the City, asserting that the City did not comply with "[OKLA. STAT. tit. 11 (Supp. 1977)] 270.14 because there was no time given for protest." (See page 17 of the Jurisdictional Statement.) Failure to publish the ordinance acknowledging receipt of the preliminary plans and failure to give said notice thereof to citizens, therefore emerge as the pivotal issues.

Appellees submit that the problem is one of statutory construction. The Oklahoma Legislature drafted the pertinent statutes in contemplation that sewer districts might be

created either by the citizens themselves (herein referred to as the "petition method") or by the direct action of the City officials (referred to herein as the "resolution method"). When the citizens petition for a sewer district and the petition is found sufficient, the City *must* construct the sewer district. The relevant statutory provision regarding the petition method states, in pertinent part:

> ". . . The governing body *shall* cause sewers and/or district water distribution lines to be constructed in each district whenever the record owners of more than one-half (½) the area of the land liable to assessment for said improvements shall petition therefor. Said districts may include mains and submains where the same are within the limits of the district or are necessary outlets or supply lines thereto. *The cost of such district sewers and district water distribution lines*, including said mains and sub-mains, *shall be assessed and collected as hereinafter provided;* the cost of such district sewer shall be assessed and collected as hereinafter provided; . . ." (emphasis added) OKLA. STAT. tit. 11 § 270.6 (Supp. 1977)

In the State of Oklahoma, the prevailing rule of statutory construction is that the word "shall" is mandatory and synonymous with the term "must" allowing no discretion on the part of the person required to act. *State ex rel. Ogden* v. *Hunt*, 286 P.2d 1088 (Okla. 1955); and *Oklahoma Alcoholic Beverage Control Bd.* v. *Moss*, 509 P.2d 666 (Okla. 1973).

The alternative method (resolution method) of creating a sewer district is set out at OKLA. STAT. tit. 11 § 270.8 (Supp. 1977) and provides:

"§ 270.8 District sewer or water lines without petition—Preliminary plans and costs.

"Whenever *the governing body* shall deem district sewers, or district water distribution lines necessary, it may proceed with such work without petition, and *shall*, by resolution, *require the city* or town *engineer*, or other registered professional engineer, *to prepare* and file *preliminary plans, showing a preliminary estimate of the cost of such improvement*, and as assessment plat, showing the area to be assessed. In the event non-contiguous areas are included in the same district, separate preliminary estimates shall be filed as to each area. The governing body shall have the power to adopt any material or methods for the construction of such work." (Emphasis added)

The appellees submit that the statute (OKLA. STAT. tit. 11 § 270.10 (Supp. 1977)) next following the description of the formation of a sewer district without petition (Section 270.8) outlines the procedure necessary to be followed in forming the resolution method district.

" §270.10 Resolution approving plans, estimates and assessment plats—Notice of resolution—Protests.

"*Upon the filing of said preliminary plans, preliminary estimate* and assessment plat, the governing body of such incorporated city or town shall examine the same, and if found satisfactory, shall by resolution adopt and approve the same, and declare such work of improvement necessary to be done. Said resolution shall be published for at least two consecutive Thursday issues, if published in a daily newspaper, or at least two consecutive issues, if published in a weekly newspaper, which newspaper shall be of general circulation in said city or town. Such notice shall further provide that if the record owners of more than one-half in area

of the land to be assessed shall not within fifteen (15) days after the last publication thereof, file with the Clerk of said incorporated city or town, their protest in writing against the improvement, then the incorporated city or town shall have the power to cause such improvement to be made and contract therefor and to levy assessments for the payment thereof; Provided, that after the same shall have been protested by the owners of more than fifty percent of the land liable to assessment the governing body of said incorporated city or town shall not advertise the same again for a period of six months, except on petitions as heretofore provided. In addition to the publication notice prescribed by statute in the creation of a local improvement district or special assessment district by a town, city, county or district, notice by mail shall be given as hereinafter provided: Not less than ten days before the first hearing affecting the proposed district, the town, city, county or district clerk, as the case may be, shall notify each listed owner of land as shown by the current year's tax rolls in the County Treasurer's office, said list to be furnished by the engineer, by mailing a postal card directed to said owner at his last known address as shown by said ownership list, stating the initiation of the proceedings and that the property, describing it, will be liable to assessment to pay for the improvement naming the newspaper and the issues thereof in which the resolution prescribed by statute is to be published and referring the owner to each publication for further particulars. Provided, that failure to receive such notice shall not invalidate the proceedings affecting said district. If several tracts are owned by the same person, all may be included in the same notification. Provided, that in lieu of a mailing of the aforesaid postal card, that said clerk may mail to each of said owners a copy of the newspaper publication which mailing shall be not less than ten days

before the first hearing. Proof of notification shall be made by affidavit of said clerk and filed in his office." (Emphasis added)

Without recapitulating all the constructional analyses relied upon by the Oklahoma Supreme Court and/or submitted by the appellees in construing these statutes to determine if the notice provisions of Section 270.10 apply to districts created by the petition method, we submit only the following. The petition method statute (Section 270.6) states "the cost of such district sewers shall be as hereinafter provided" which leads one quite naturally to OKLA. STAT. tit. 11 § 270.16 (Supp. 1977) entitled "Preparing and filing final statement of costs—Preparing and filing assessment roll," etc. No specific methods are set out for implementing this petition method district.

Conversely, Section 270.8, which permits the formation of a sewer district by direct action of the assessing authority, states that the City may form such a district by preparation of preliminary plans and preliminary estimates. Section 270.10 opens with a reference to those same *preliminary plans*, the publication thereof and the notice provisions. There is no reference to preliminary plans of any kind in Section 270.6, so references in 270.10 must refer back to Section 270.8 and not Section 270.6.

The Supreme Court of Oklahoma in the instant case has construed the above referenced statutes and held that "the language of the statute requiring notice of the passage of such resolutions [Section 270.10] is clearly limited to cases in which a sewer district is created using the non-petition method." (Statutory reference added for clarification and see page A-9 of Appellants' Jurisdictional Statement.)

In this regard it is critical to note that the main case offered by the appellants, *Lance* v. *Sulphur*, 503 P.2d 867 (Okla. 1972), is one in which the assessment district was created by the direct action of city officials. It is therefore, not applicable to the present case. The appellees agree that the publication notice requirements of Section 270.10 are necessary jurisdictional prerequisites when the district is created by direct action of city officials (Section 270.8), but argue that under the petition method (Section 270.6) the finding of sufficiency of the filed petition confers upon the assessing authority all the power and jurisdiction needed to cause the improvement and levy the assessments.

The Supreme Court of the United States has stated that it will accept the construction of a given state's statutes by the highest court of the given state. *Chicago, M. St. P. & P. R. Co.* v. *Risty*, 276 U.S. 567, 570 (1928). The Supreme Court in *Londoner* v. *Denver*, while acknowledging the validity of the construction of Colorado's assessment statutes by the Supreme Court of Colorado, stated in *dicta*:

> ". . . We think it fitting, however, to say that we see nothing extraordinary in the method of interpretation followed by the court, or in its results. Whether we should have arrived at the same conclusions is not of consequence." *Londoner* v. *Denver*, 210 U.S. 373, 379 (1908).

As to the constitutionality of the necessity for notice in the early stages of formation of an assessment district, the Supreme Court has narrowly defined the area which

may be attacked on the ground of lack of due process by holding in *Chicago M. St. P. & P. R. Co. v. Risty*, 276 U.S. 567, 570 (1928):

> "[3] Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if landowners who may be assessed are later afforded a hearing upon the assessment itself. Londoner v. Denver, 210 U.S. 373, 378, 28 S.Ct. 708, 52 L.Ed. 1103; Goodrich v. Detroit City, 184 U.S. 432, 437, et seq., 22 S.Ct. 397, 46 L.Ed. 627; Voight v. Detroit, 184 U.S. 115, 122, 22 S.Ct. 337, 46 L.Ed. 459; Embree v. Kansas City Road District, 240 U.S. 242, 36 S.Ct. 317, 60 L.Ed. 624; Soliah v. Heskin, 222 U.S. 522, 32 S.Ct. 103, 56 L.Ed. 294."

Since the Opinion of the Oklahoma Supreme Court rendered in this case states (See A-11 of Appellants' Jurisdictional Statement): "the parties stipulated that a time and place was set for an assessment as required, that proper notice of the hearing was published and that the property owners involved received notice of the hearing" and said statement is supported in the record by Items 17 through 27 of the original Stipulations contained in the certified record, it is urged that all due process attacks on the procedural steps urged by the appellants are without merit.

We submit that the judgment of the Oklahoma Supreme Court should be affirmed since the questions urged have been so plainly foreclosed by prior decisions of the Supreme Court as to make further argument unnecessary.

QUESTION III

Do prior decisions of the Supreme Court on a given subject deprive a federal question of the necessary degree of substantiality?

The Supreme Court has held in *California Water Service Co. v. Redding*, 304 U.S. 252, 255 (1938):

> "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." [Citations omitted.]

While the appellees do not urge that no federal question exists in this appeal, we do urge that holdings similar to that in the *California Water Service* case, *supra*, namely *Zucht v. King*, 260 U.S. 174 (1922); *Leonard v. Vicksburg*, 198 U.S. 416 (1905); *Missouri Pacific Railway Company v. Ozro Castle*, 224 U.S. 541 (1912) compel the conclusion that the present appeal is one which lacks the necessary substantiality since the previous decisions of this Court foreclose the subject.

CONCLUSION

For the foregoing reasons, either this appeal should be dismissed or the judgment of the Supreme Court of Oklahoma should be affirmed.

Dated this ..... day of ....., 1978.

Respectfully submitted,

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Oklahoma City, Oklahoma 73102

Attorneys for Appellees

January, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of January, 1978, three copies of this Motion to Dismiss or In the Alternative to Affirm were mailed, postage prepaid, to Attorneys for Appellants, Bill Pipkin and William C. Leach, 110 West Main, Moore, Oklahoma 73160, and to Buck and Crabtree, Attorneys for M. A. Swatek and Company, 2500 Liberty Bank Tower, 100 Broadway, Oklahoma City, Oklahoma 73102.

.....

WALTER M. POWELL